

The Commonwealth of Massachusetts
DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY

July 1, 2005

D.T.E. 05-27

Investigation by the Department of Telecommunications and Energy on its own motion pursuant to General Laws c. 164, § 94, and 220 C.M.R. §§ 5.00 et seq. as to the propriety of the rates and charges set forth in the following tariffs: M.D.T.E. Nos. 34 through 68, filed with the Department on April 27, 2005 by Bay State Gas Company.

HEARING OFFICER RULINGS ON MOTIONS TO CONDUCT DEPOSITIONS

I. INTRODUCTION

On April 27, 2005, Bay State Gas Company (“Bay State”) petitioned the Department of Telecommunications and Energy (“Department”) for approval of tariffs designed to collect additional revenues of \$22.2 million, a performance-based regulation plan, a pension/PBOP reconciliation adjustment proposal, and another related rate mechanism for replacement of steel mains. The Department docketed the petition as D.T.E. 05-27. The Department held public hearings on May 25, 2005 at the Ludlow Town Hall in Ludlow; May 26, 2005 at the Brockton City Hall in Brockton; and May 31, 2005 at Memorial Hall Library in Andover.

On May 6, 2005, the Attorney General of the Commonwealth of Massachusetts (“Attorney General”) filed a notice of intervention pursuant to G. L. c. 12, § 11E. The

Hearing Officer granted intervenor status to additional parties on May 24, 2005; June 2, 2005; and June 14, 2005.¹

On June 2, 2005, Local 273, Utility Workers Union of America, AFL-CIO ("Local 273") and the Attorney General filed motions, pursuant to 220 C.M.R. § 1.06(6)(c)(6), for depositions of certain Bay State witnesses ("Local 273 Motion," "Attorney General Motion," respectively). On June 9, 2005, Bay State filed an opposition to the Attorney General Motion ("Bay State Opposition to Attorney General"). On June 10, 2005, Bay State filed an opposition to Local 273 Motion for depositions ("Bay State Opposition to Local 273"). Then, on June 24, 2005, the Attorney General filed a supplemental list identifying additional deponents ("Attorney General Supplement") to which Bay State filed a response on June 27, 2005.

¹ On May 24, 2005, the Hearing Officer granted intervenor status to Associated Industries of Massachusetts; United Steelworkers of America AFL-CIO-CLC; Local 273, Utility Workers Union of America, AFL-CIO; and limited participant status to Western Massachusetts Electric Company. On June 2, 2005, the Hearing Officer granted intervenor status to Boston Edison Company; Cambridge Electric Light Company; Commonwealth Electric Company; Commonwealth of Massachusetts Division of Energy Resources; KeySpan Energy Delivery New England; Low-Income Weatherization and Fuel Assistance Program Network; Massachusetts Association for Community Action; Massachusetts Energy Directors Association; Massachusetts OilHeat Council, Inc.; MASSPOWER; NSTAR Gas Company; and limited participant status to New England Gas Company and Fitchburg Gas and Electric Light Company d/b/a Unitil. On June 14, 2005, the Hearing Officer granted limited participant status to The Berkshire Gas Company.

II. SUMMARY OF MOTIONS AND OPPOSITIONS

A. Attorney General Motion

The Attorney General moves for leave to conduct depositions of Ed Anderson, Edward Collins, Keith Dalton, John Nerden, Bay State's Call Center manager(s), Bay State's pipe repair and replacement manager(s), Bay State's third-party corrosion consultant(s), and others as ongoing efforts identify them (Attorney General Motion at 1-2; Attorney General Supplement at 1). The Attorney General asserts that these depositions will create a more complete, accurate, and efficient record (Attorney General Motion at 1-2). Additionally, the Attorney General claims that the depositions will allow him to develop rebuttal evidence to Bay State's positions on certain issues (id. at 2).

B. Local 273's Motion for Depositions

Local 273 moves to take depositions of Stephen Bryant, John Skirtich, Stephen A. Barkauskas, Danny G. Cote, Joseph A. Ferro, Lawrence Kaufmann, and Paul Moul (Local 273 Motion at 1). Local 273 asserts that these depositions will expedite the discovery process and reduce the amount of hearing time in the case (id. at 1-2). Local 273 claims that its depositions will not cover issues other than those filed by Bay State in its initial petition and testimony.

C. Bay State's Oppositions to Motions for Depositions

1. Opposition to Attorney General's Motion for Depositions

Bay State opposes the Attorney General Motion asserting that the depositions he seeks would burden the parties and unduly complicate the proceeding without any corresponding benefit (Bay State Opposition to Attorney General at 1-3).² Bay State claims the Attorney General Motion seeks numerous depositions that would lead to an unmanageable procedural schedule (id. at 1-4).³ Bay State argues that the Department's ground rules issued on June 13, 2005 accommodate the case's six-month statutory deadline by eliminating the need for depositions (id. at 5). Bay State asserts that the Department rarely permits depositions, and never in cases governed by a six-month statutory deadline that governs this case, because its ground rules allow: (1) almost unlimited written discovery and follow-up; (2) supervised hearings whereby the examination's scope is limited by a presiding officer; (3) extensive cross-examination of witnesses; and (4) the issuance of oral record requests during evidentiary hearings (id. at 4-5).

Bay State also opposes the Attorney General Motion contending that the depositions, as described, would be inefficient and costly (id. at 6). Bay State argues that depositions would

² Bay State also claims that the Attorney General failed to include the names and titles of various potential deponents and is therefore in violation of 220 C.M.R. § 1.06(6)(c)6.b (id. at 2-3).

³ According to Bay State, the burdens include (1) deposing witnesses upon which Bay State does not rely; and (2) duplicating testimony during depositions and hearings (id. at 3-4).

be inefficient because: (1) no presiding officer would be present to limit the scope of questions; (2) any party could examine the witnesses and cause delays; and (3) objections made during depositions would be argued after the deposition; (id. at 3-5).

2. Opposition to Local 273 Motion

Similarly, Bay State opposes the Local 273 Motion because the depositions Local 273 seeks would burden the parties and unduly complicate the proceeding without any corresponding benefit (Bay State Opposition to Local 273 at 1). Bay State claims that the Department's ground rules issued on June 13, 2005 accommodate the six-month statutory deadline and eliminate the need for depositions (id. at 3). Bay State asserts that the Department rarely permits depositions, and never in cases governed by a six-month statutory deadline that governs this case, because its ground rules allow: (1) almost unlimited written discovery and follow-up; (2) supervised hearings whereby the examination's scope is limited by a presiding officer; (3) extensive cross-examination of witnesses; and (4) the issuance of oral record requests during evidentiary hearings (id.).

Bay State also states that depositions are not necessary, practical, or efficient, because it has taken all reasonable efforts to make witnesses available for hearings (id. at 1).

Furthermore, Bay State argues that depositions would be inefficient because: (1) no presiding officer would be present to limit the scope of questions; (2) any party could examine the witnesses and cause delays; (3) objections made during depositions would be argued after the

deposition; and (4) duplicate testimony during depositions and hearings would unduly burden the affected parties and the Department (id. at 4).

III. ANALYSIS AND FINDINGS

A. Introduction

“Depositions may be taken if agreed to by all parties or by Order of the presiding officer . . .” who may, in her discretion “impose reasonable conditions on the deposition process” 220 C.M.R. § 1.06(6)(c)6.a. “The presiding [or hearing] officer shall grant a motion for deposition if it is determined that the taking of a deposition will be more efficient than other available discovery methods, and will not unduly burden the affected parties.” 220 C.M.R. § 1.06(6)(c)6.b. Furthermore, the hearing officer shall exercise her discretion in establishing discovery procedures that “balance the interests of the parties and ensure that the information necessary to complete the record is produced without unproductive delays.” 220 C.M.R. § 1.06(6)(c)(2). Additionally, “all motions for deposition should include the name and title of the person to be deposed, the issues which will be the subject of the deposition, and a statement of the manner in which the deposition will expedite the hearing process” 220 C.M.R. § 1.06(6)(c)6.b.

B. Attorney General Motion for Depositions

The Department's ground rules issued in this case, in concert with the Department's Procedural Rules at 220 C.M.R. § 1.00 et seq. allow, within the six-month statutory deadline:⁴ (1) extensive written discovery and follow-up⁵; (2) supervised hearings whereby the examination's scope is subject to control by the hearing officer; (3) the presentation of witnesses; (4) extensive cross-examination of witnesses; and (5) the issuance of oral record requests during evidentiary hearings. The ground rules and the procedural schedule, which do not provide for the conduct of depositions, are designed to ensure the orderly conduct of this proceeding.

The Attorney General's proposed depositions are unduly burdensome to Bay State because his motion is broadly written without identifying all personnel but listing numerous topics and includes depositions of witnesses not relied on by Bay State. Furthermore, such depositions would be nearly impossible to accomplish within the six-month statutory deadline due to burdens and inefficiencies resulting from: examinations and unsupervised questions from any party, the likelihood of duplicate testimony in depositions and hearings, and postponed arguments to objections made during hearings (Bay State Opposition to Attorney General at 3-5). Finally, the Attorney General Motion is unnecessary, impractical, and

⁴ G. L. c. 25, § 18.

⁵ The ground rules in this case do not impose a number limitation on written information requests, as would be the case in a civil proceeding. See Mass. R. Civ. P. Rule 33(a)(2) (limitation of 30 interrogatories).

inefficient because Bay State has made witnesses available to respond to written information requests and for cross-examination at hearings.

Therefore, I find that the Attorney General Motion will unduly burden the Department and parties, will be more inefficient than other available discovery methods, and omits essential components required by 220 C.M.R. § 1.06(6)(c)6.b.⁶ Furthermore, I find that any benefit in conducting these depositions would be outweighed by the undue burdens and inefficiency in conducting them. Thus, pursuant to 220 C.M.R. § 1.06(6)(c)6.b., I deny the Attorney General Motion.

B. Local 273 Motion for Depositions

As stated above, the Department's ground rules are suited to this case because they accommodate the case's six-month statutory deadline and allow: (1) extensive written discovery and follow-up; (2) supervised hearings whereby the examination's scope is subject to control by the Hearing Officer; (3) extensive cross-examination of witnesses; and (4) oral record requests during evidentiary hearings (Bay State Opposition to Local 273 at 3). As stated above, the ground rules and the procedural schedule, which do not provide for the conduct of depositions, are designed to ensure the orderly conduct of this proceeding.

Local 273's proposed depositions would result in an undue burden on affected parties and the Department because those depositions would cause delays and increase rate case

⁶ The Attorney General Motion omits the names and titles of various potential deponents required by 220 C.M.R. § 1.06(6)(c)6.b.

expenses. Furthermore, such depositions would be nearly impossible to accomplish within the six-month statutory deadline because of inefficiencies resulting from: examinations and unsupervised questions from any party; the likelihood of duplicate testimony in depositions and hearings; and postponed arguments to objections made during hearings. Finally, Local 273 Motion is unnecessary, impractical, and inefficient because Bay State has made witnesses available to respond to written information requests and for cross-examination at hearings.

Therefore, I find that Local 273 Motion will unduly burden the Department and parties, and will not be more efficient than other available discovery methods. Furthermore, I find that any benefit in conducting these depositions would be outweighed by the undue burdens and inefficiency in conducting them. Thus, pursuant to 220 C.M.R. § 1.06(6)(c)6.b., I deny Local 273 Motion.

V. RULINGS

Accordingly, after due notice and consideration, it is

RULED: That the Attorney General's motion for depositions of certain Bay State Gas Company witnesses be, and hereby is, DENIED; and it is

FURTHER RULED: That Local 273, Utility Workers Union of America, AFL-CIO's motion for depositions of certain Bay State Gas Company witnesses be, and hereby is, DENIED.

VI. APPEAL

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any affected person may appeal this ruling to the Commission by filing a written appeal with supporting documentation by July 14, 2005. A written response to any appeal must be filed by July 21, 2005.

_____/s/_____
Caroline M. Bulger
Hearing Officer